United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7053-7084

To be argued by
HENRY J. O'BRIEN

United States Court of Appeals

FOR THE SECOND CIRCUIT

WILLIAM GARAFOLA,

Plaintiff-Appellee,

—against—

F. A. DETJEN, "SAAB",

Defendant & Third Party Plaintiff-Appellee-Cross-Appellant,

—against—

PITTSTON STEVEDORING CORP.,

Third Party Defendant-Appellant.

BRIEF OF DEFENDANT AND THIRD PARTY PLAINTIFF AS APPELLANT ON ITS SUPPLEMENTAL APPEAL FROM ORDER GRANTING PRE-JUDGMENT INTEREST (CONSOLIDATED WITH ABOVE APPEALS)

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INDEX

TABLE OF CASES

STATUTE

RULES

TREATISES

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-against-

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STATEMENT

Although the above-entitled appeals from the longshoreman-plaintiff's recovery of $235,000 for personal injuries contained in the final judgment dated December 13, 1974 and entered on December 14, 1974, (SA 4a)* had already been perfected prior to February 21, 1975, the plaintiff, nevertheless, moved on that date for an order amending the aforesaid judgment to include a direction that the plaintiff is entitled

*SA refers to the Supplemental Appendix on the appeal from the order granting plaintiff's motion for pre-judgment interest

to interest thereon from December 10, 1973 (SA 10a), (the date upon which a purported "judgment", unauthorized by law was prepared and entered by the clerk) (SA 2a). That motion having been denied, without prejudice, because of the pending appeals, the plaintiff renewed his motion in May, 1975 (SA 8a) by permission of this Court (SA 7a) which the District Court granted in a memorandum order (SA 40a) from which the defendant and third party plaintiff now appeals (SA 44a), such appeal having been consolidated with the pending appeals from the final judgment as allowed by this Court in the order of remand granting such permission (SA 7a).

The unauthorized "judgment" was entered notwithstanding that the jury verdict, upon which the purported "judgment" was based, did not finally dispose of all the claims in the action because it had left open for determination that part of the third party plaintiff's indemnity claim for its "reasonable counsel fees" in defense of the action, and the District Court had not been requested to and had not made "an express determination that there is no just reason for delay" and "an express direction for the entry of judgment" upon the plaintiff's recovery as explicitly required by Rule 54(b) of the Federal Rules of Civil Procedure (SA 2a, 13a).

The fact is that prior to the entry of the final judgment appealed from, disposing of all of the claims in the action, the status of the clerk's "judgment" had already been

tested in this Court by a motion dated February 25, 1974 to dismiss the attempted appeal therefrom by the third party defendant for lack of appellate jurisdiction on the ground that the document appealed from was not a judgment "however designated" within the meaning of Rule 54 of the Federal Rules of Civil Procedure, because it did not dispose of all the claims in the action and did not contain the express determination and direction required by Rule 54(b). That attempted appeal was dismissed on March 12, 1974. (SA 3a)

The plaintiff's renewed motion in the District Court in May, 1975, was based upon the same papers that he had submitted in support of his previous motion to amend the judgment. (SA 8a)

Although the plaintiff asserted in both notices of motion that he was moving for interest "as agreed upon by counsel" (SA 11a), this statement was pure fiction since no "agreement" existed and it was apparently based upon his unilateral statement and his supposition during the colloquy following the jury verdict that "interest runs", without more (SA 13a). Of course, interest would have run if the plaintiff had requested and obtained the District Court's express certification "that there is no just reason for delay" in entering judgment upon the plaintiff's recovery and a "direction for the entry of judgment" thereon pursuant to Rule

54(b). Plaintiff did not do so and no "agreement" was ever made that interest would run on plaintiff's recovery, notwithstanding the well settled rule of law (hereinafter discussed) that statutory interest under 28 USC § 1961 does not run on a jury verdict until a judgment as defined in Rule 54 of the Federal Rules of Civil Procedure is entered.

It is evident that the trial judge, in granting the plaintiff's motion to amend the judgment by allowing pre-judgment interest recognized this assertion of an "agreement" as pure fiction, since he granted the motion solely on the mistaken view that the issue of counsel fees was not an integral part of the indemnity claim, since in the opinion of the Court, "all claims including those of the third parties were determined by the jury, and the remaining issue to be decided was the counsel fees due the shipowner by the stevedore." (SA 40a)

In making that determination, Judge Bruchhausen was under the misconception that a claim is finally disposed of for the purposes of interest-bearing judgment finality, even though the portion of the indemnity damages consisting of "counsel fees" has not yet been determined. Adhering to that mistaken belief, he held that the controlling decision by this Court in Caputo v United States Lines, 311 F.2d 413,

(2d Cir., 1963), hereinafter discussed, was not dispositive of the legal question involved because in that case, although the plaintiff had obtained a verdict in his favor, no part of the third party claim had been adjudicated. (SA 42a)

Following this misconception, the District judge fell further into error and mistakenly stated that:

> "The delay of approximately one year in arriving at the amount of counsel fees was not attributable to the plaintiff, nor was he involved in such determination." (SA 42a)

Thus, the District Court overlooked the fact that it was the duty and obligation of the plaintiff, who had obtained a full recovery verdict on his claim, now on appeal, to request the Court at that time, and not a year later, for an express determination that "there is no just reason for delay" and to direct the entry of judgment on his claim alone, thus permitting interest to run on it. Indeed, that is exactly the reason for the Rule 54(b) requirement of the "no just reason for delay" determination.

Manifestly, the misconception of the District judge is highlighted by the provision in item 1 of the final judgment appealed from that, "the purported final judgment dated December 7, 1973 and entered on December 10, 1973 be and is hereby superseded and vacated." (SA 5a)

In accordance with the remand order of May 6, 1975 (SA 7a), the appeal of the defendant and third party plaintiff from the aforesaid order of Judge Bruchhausen granting the motion (pursuant to Rule 60(a) and (b) of the Federal Rules of Civil Procedure) has been taken and consolidated with the main appeals.

ISSUE PRESENTED

Whether the District Court properly granted the motion of the plaintiff pursuant to Rule 60(a) and (b) of the Federal Rules of Civil Procedure, to amend the final judgment appealed from by allowing retroactive statutory interest (28 USC § 1961) on the plaintiff's recovery from the date of the entry of a clerk's purported premature "judgment", which had not finally determined the remaining third party claim, without a previous "express determination that there is no just reason for delay" and an "express direction for the entry of judgment" on plaintiff's recovery, as required by Rule 54(b) of the Federal Rules of Civil Procedure, on the stated basis that the delay in the entry of the final judgment disposing of all claims was not attributable to the plaintiff, notwithstanding that the plaintiff had never requested or obtained from the Court such express determination and direction, and that the jury verdict determined all the claims in the action, even though the issue of the amount of "counsel fees" on the third party claim for indemnity had not yet been decided.

POINT I

CONTRARY TO THE COURT'S DECISION, THE DELAY IN THE ENTRY OF A FINAL INTEREST-BEARING JUDGMENT FOR THE PLAINTIFF WAS WHOLLY ATTRIBUTABLE TO THE PLAINTIFF SINCE HE FAILED TO MAKE AN APPLICATION TO THE COURT AT ANY TIME FOR, OR OBTAIN, AN EXPRESS DETERMINATION AND DIRECTION PURSUANT TO RULE 54(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE*

Although the plaintiff's motion to amend the judgment to allow pre-judgment statutory interest from the date of the purported "judgment", made by the clerk a year before, asserted that the plaintiff was entitled to interest, "as agreed upon by counsel" (SA 11a), it is obvious, as discussed in the "Statement" above that this assertion was a fiction and that no such agreement ever existed.

The asserted "agreement" is apparently based on the verbal exchange between the plaintiff's counsel and the clerk of the Court in which the plaintiff's counsel said to the clerk, "Will judgment be entered Monday?", to which the clerk answered, "Immediately", and to which the plaintiff's counsel responded, "Interest runs" (SA 13a), a wholly unilateral assumption by the plaintiff that once the clerk

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*"When more than one claim for relief is presented in an action ... the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the right and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties..."

enters a purported judgment, "Interest runs", without regard to the mandatory requirement for a determination and direction pursuant to Rule 54(b), in order to authorize an interest-bearing judgment "however designated", once the third party claim had not yet been fully decided.

As pointed out in the affidavit in opposition to the motion (SA 29a, 30a), the first time that the asserted "agreement" was mentioned by plaintiff's attorney was in his motion of February, 1975 for pre-judgment interest, subsequent to the pre-argument conference before the Staff Counsel when it was brought to his attention that interest did not run on plaintiff's recovery until the entry of the final judgment appealed from. As previously noted, this "agreement" was so obvious that the trial judge gave it no regard whatever in his decision granting the plaintiff's motion to amend. (SA 40a).

Plaintiff's attorney attempted to make a distinction between the case at bar and this Court's decision in Caputo v United States Lines Co., 311 F.2d 413, (2d Cir., 1963), holding that interest could not run on a clerk's purported "judgment" in favor of the plaintiff when the third party claim had not yet been disposed of, on the ground that in Caputo, the third party complaint was entirely left outstanding, whereas in the clerk's purported "judgment" in the case at bar, the portion of the third party claim remaining to

be decided was solely the determination of "counsel fees". Apparently, this argument was mistakenly adopted by the District Court in its decision contained in the order appealed from (SA 42a). Of course, the answer to this misconception was that the plaintiff was in the position to request and obtain a determination pursuant to Rule 54 (b) prior to the entry of the final judgment appealed from even though he may not have realized (though he should have as experienced counsel) that this was a situation requiring a Rule 54(b) direction before interest would run on his recovery.

In any event, when the motion to dismiss the previous appeal of the third party defendant from the clerk's purported "judgment" for lack of appellate jurisdiction was made the month following the entry of that unauthorized document, the plaintiff's attorney was most certainly alerted to the fact that the third party claim had not been determined and that the plaintiff was required to obtain a Rule 54(b) determination for the entry of a separate judgment on his recovery claim.

As pointed out in the motion to dismiss the appeal, a claim has not been finally adjudicated where that portion of the claim relating to damages consisting of

"counsel fees" remains outstanding and undetermined and of course, it is well settled that the expenses, such as counsel fees, incurred by the shipowner in defending against the plaintiff longshoreman's claim, are part of the defendant shipowner's damages, recoverable from the third party defendant stevedore as part of the indemnity award, cf. Massa v C. A. Venezuelan Navigacion, 332 F.2d 779, (2d Cir., 1964) and Guarracino v Luckenbach Steamship Co., 333 F.2d 646, (2d Cir., 1964) and cases cited therein. Consequently, insofar as the application of Rule 54(b) is concerned, it was absolutely necessary for the plaintiff to obtain a determination and direction for the entry of a separate judgment in order to allow the plaintiff's recovery to bear interest prior to the disposition of the third party claim. As this Court said in Aetna Casualty & Surety Co. v Giesow, 412 F.2d 468, (2d Cir., 1969) at page 470:

> "the issues of damages and counsel fees are so inexorably interconnected as to make this a single claim."

Clearly, this Court's order of March 12, 1974 dismissing the appeal from the clerk's "judgment" for lack of appellate jurisdiction (SA 3a) is the law of the case and was clear guideline for the plaintiff's attorney to seek and obtain a Rule 54(b) determination and direction as soon as possible to start the running of interest.

Surely, the plaintiff, having been "represented by experienced legal counsel, whose duty it was to protect his clients by seeing that the important filing deadline [to start the running of interest by applying for and obtaining an express determination and direction pursuant to Rule 54(b)] would be met ", is bound by the failure of his counsel experienced in longshore cases (such as Caputo) to make such a timely application. See above quotation in Stirling v Chemical Bank, 511 F.2d 1030, at page 1032, (2d Cir., 1975). Such failure of counsel to act cannot be attributable to any delay by the third party plaintiff and the third party defendant in obtaining a determination of the amount of counsel fees as between themselves, since they did not prevent plaintiff's counsel from so acting and the very purpose of Rule 54(b) is to obtain the entry of judgment when there is "no just reason for delay" because of the pending and undetermined claim between other parties.

The rule that a 54(b) determination and direction is required to commence the running of interest is not a novel or esoteric doctrine. The "collateral effects of a Rule 54(b) order" with respect to interest and other features of a non-appellate final judgment is discussed in 10 Wright & Miller, Federal Practice and Procedure § 2661, citing Caputo and other cases. It is there stated:

"Another effect of a Rule 54(b) order is on the accrual of interest on a judgment, since interest begins to accumulate only on a judgment that has become final. Thus, for example, in one case the clerk entered a judgment on November 6, 1961, in favor of plaintiff longshoreman and against the shipowner but there was no Rule 54(b) certificate; a final judgment later was entered on March 20, 1962, dismissing the shipowner's complaint against a third party. The court held that the longshoreman was not entitled to interest from the date of the first judgment."

In addition to Caputo v U.S. Lines, 311 F.2d 413, (2d Cir., 1963), the treatise points out the obligation of the plaintiff to obtain such a 54(b) determination in order to commence the running of interest in footnote 92, at page 91 as follows:

"When defendant in an action for wrongful death had brought in a third-party defendant on a theory of indemnity and the pretrial order provided that the court would order separate trials of the issues made by the complaint in both the main and the third-party actions and upon the completion of a trial of those issues the court would make a Rule 54(b) certificate and on the date of the jury's verdict in favor of plaintiff, plaintiff did not obtain that certificate, his failure to do so was fatal to his claim of interest on the judgment on the date of the jury verdict. Howell v Sinclair Ref. Co., D. C. Ala. 1957, 20 F.R.D. 623." [Emphasis added.]

To the same effect, see 6 Moore's Federal Practice, 2d Edition ¶54.2.

Inasmuch as the plaintiff's claim was a longshoreman's federal personal injury maritime claim against the shipowner for negligence and unseaworthiness tried to a jury and disposed of by a jury verdict, the only interest allowable on the verdict would be the statutory interest pursuant to 28 USC § 1961, which provides that "such interest shall be calculated from the date of the entry of the judgment". Cf. Moore-Mc Cormack Lines, Inc. v Richardson, 295 F.2d 583, (2d Cir., 1961) at pages 592 and 594, Barrios v Louisiana Construction Materials Company, 465 F.2d 1157, (5 Cir., 1972) and Robinson v Pocahontas, Inc., 477 F.2d 1048, (1 Cir., 1973). Of course, statutory interest runs from the entry of the judgment and is not suspended by post-trial motions or by a plaintiff's appeal from the judgment. Litiwinowicz v Weyerhauser Steamship Company, 185 F.Supp. 692, (ED Pa., 1962). Kotsopoulos v Asturia Shipping Co., S. A., 467 F.2d 91, (2d Cir., 1972).

CONCLUSION

PLAINTIFF IS NOT ENTITLED TO PRE-JUDGMENT INTEREST ON HIS FEDERAL MARITIME PERSONAL INJURY JURY VERDICT AND THE ORDER OF THE DISTRICT COURT GRANTING THE PLAINTIFF'S MOTION TO AMEND THE FINAL JUDGMENT OF DECEMBER 14, 1974 BY ALLOWING PRE-JUDGMENT INTEREST SHOULD BE REVERSED.

The District Court committed error when it granted plaintiff's motion to amend the final judgment of December 14, 1974, allowing retroactive statutory interest from the

date of the jury verdict, before a final appealable interest-bearing judgment determining all the claims, including the amount of counsel fees, in accordance with the mandate of Rule 54, had been entered.

Counsel fees were an integral part of the third party defendant shipowner's claim for indemnity against the third party defendant stevedore and until they were resolved all the claims in the action had not been fully adjudicated.

The nullity of the non-final, non-appealable so-called clerk's "judgment" of December 7, 1973, which was vacated by the District Court's final judgment of December 14, 1974, was determined by this Court in March, 1974, when it dismissed the third party defendant's notice of appeal for lack of appellate jurisdiction.

Plaintiff had a tailor-made remedy, for just such a situation as this, under Rule 54(b), permitting him to obtain from the District Court an "express determination" and direction for the entry of a separate judgment upon his claim, on which interest would have run and it was the duty of his attorney to apply to the Court for such a certification. His access to this remedy was in no way dependent upon the pending negotiations between the third party plaintiff shipowner and the third party defendant stevedore, relating to the amount of attorneys' fees to which the shipowner was entitled.

Plaintiff's attorneys' misunderstandings or misapprehensions regarding the remedy available under Rule 54(b) cannot change the letter of the law which is specific concerning interest in maritime personal injury actions tried to a jury and it is fatal to his claim for interest prior to the time when the final judgment disposing of all the claims was entered on December 14, 1974.

Consequently, the order of the District Court granting what amounts to pre-judgment interest to plaintiff is contrary to the law and should be set aside.

Respectfully submitted,

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Dated: New York, New York

August 8 , 1975

HENRY J. O'BRIEN
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Counsel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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WILLIAM GARAFOLA,

Plaintiff-Appellee,

-against-

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Party Plaintiff-
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-against-

PITTSTON STEVEDORING CORP.,

Third Party
Defendant-Appellant.

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Docket No.'s
75-7053
75-7084

CERTIFICATE
OF
SERVICE

WE HEREBY CERTIFY that ~~a copy~~ 2 copies of the within brief was this date mailed to the following:

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